Office-Supreme Court, U.S.
FILED
AUG 10 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2177

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MARJORIE LEHMAN, on behalf of her children, WILLIAM LEHMAN, MARK LEHMAN and FRANK LEHMAN,
Petitioners,

—v.—

LYCOMING COUNTY CHILDREN'S SERVICES AGENCY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES. ii

INTRODUCTION. 1

COUNTERSTATEMENT OF THE CASE 2

ARGUMENT. 7

REASONS FOR DENYING THE WRIT. 7

I. THIS DECISION OF THE THIRD CIRCUIT MAY BE RECONCILED WITH THE DECISION OF THE FIFTH CIRCUIT IN DAVIS V. PAGE WITHOUT GRANTING THE WRIT. 7

II. THE ISSUES INVOLVED IN THIS WRIT HAVE BEEN DETERMINED UNDER FEDERAL LAW AND NEED NOT BE ADDRESSED BY THIS COURT. 11

A. The Opinions in the Lower Courts provide a firm basis for denying this Writ. 11

B. Other procedures existed under federal rules and statutes for determination of this state parental termination matter. 17

CONCLUSION. 21

TABLE OF AUTHORITIES

CASES:	PAGES:
Allen v. McCurry, 49 U.S.L.W. 4015 (1980)	20
Chastain v. Davis, No. 80-1888, Petition for Certiorari pending	8, 9, 10, 11
Davis v. Page, 640 F.2d 599 (Fifth Cir., 1981)	7, 9, 10
Hicks v. Miranda, 422 U.S. 332 (1975)	19
In Re: William L., 477 Pa. 322, 383 A.2d 1228, Cert. denied, 439 U.S. 88 (1979)	5, 12, 15
Lassiter v. Department of Social Services of Durham County, ____U.S.____ 49 U.S.L.W. 4586, (6/1/81)	8, 11
Marjorie Lehman v. Lycoming County Children's Services, et al, No. 77-1704, 439 U.S. 880 (1978)	6
Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 97 Supreme Ct. 1932, 52 L.Ed. 2d 531 (1977)	15
New Jersey Educational Association v. Burke, 579 F.2d 764 (Third Circuit), cert. denied 439 U.S. 894 (1978)	19, 20
Sylvander v. New England Home for Little Wanderers, 584 F.2d 1103 (First Circuit, 1978)	8, 9, 10, 16, 20

Wisconsin v. Yoder, 406 U.S. 205, 92 S. Ct. 1526, 32 L.Ed.2d 15 (1972) 15

STATUTES:

Pennsylvania Adoption Act of 1970, 1 Pa. S.§ 311 (2) 2

Pennsylvania Adoption Act of 1980, 23 Pa. C.S.A. § 2101 18

28 U.S.C. § 1257 (2) 19

42 U.S.C. § 1983 19

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Respondent, Lycoming County Children's Services Agency respectfully prays the Writ of Certiorari to the United States Court of Appeals for the Third Circuit, sought by Petitioners be denied.

The Third Circuit Court of Appeals, sitting en banc, on March 31, 1981, affirmed the Order of the United States District Court of the Middle District of Pennsylvania, entered on September 4, 1979, dismissing the Petition for Writ of Habeas Corpus. The text of the Third Circuit Court of Appeals decision is set forth at length in Petitioners' Petition, Appendix, Pages 1a to 90a. The text of the Middle District Opinion is contained in Petitioner's Appendix, Pages 135a to 149a.

COUNTERSTATEMENT OF THE CASE

On June 3, 1976, the Lycoming County Orphans' Court entered an Order involuntarily terminating Marjorie Lehman's parental rights to her three sons, pursuant to the Pennsylvania Adoption Act of 1970, 1 Pa. Statute Section 311 (2) (Lehman Petition, Page 5). Petitioner had placed her three sons in the care and custody of the Respondent in June, 1971, when the boys were respectively one, five, and seven years of

age, and they have not resided with her since that time. Petitioner's oldest child, Carol born 9/30/60 has resided with the Petitioner's parents for many years and there is no plans for her ever to return to Marjorie Lehman's home.

After the birth of the Petitioner's youngest child, Tracie, in September, 1971, Marjorie Lehman, by her own decision chose an apartment in which she still resides, which she acknowledges is not adequate for the return of the three boys. Several Lycoming County social service agencies worked with Marjorie Lehman from January, 1971 to the time of the Orphans' Court hearing in the Spring of 1976, in an effort to reunite the family. These agencies included Nutrition Aides who were in her home at least monthly for a five-year period, stressing and educating her in regards to proper food menus, nutrition guidelines, budgeting and every day problems and conerns (Orphans' Court

Transcript, hereinafter O.C.T., Pages 55-59), Nutrition Aides and Supervisors stated from their observation that Marjorie Lehman would not be able to physically or emotionally take care of all of the children (O.C.T., Page 58).

There was extensive testimony at the Orphans' Court hearing by Dr. Jacqueline B. Sallada, a psychologist, concerning evaluations which she had done with Marjorie Lehman in January, 1976. Dr. Sallada found that Marjorie Lehman "was socially functioning in the terms of self-help skill and independent skills at about the 12-year level, and that intellectually.... at the level of a six-year old child." (O.C.T., Page 31). Observation of Marjorie Lehman during times of visitation with her boys, showed that it was general havoc or "free for all", and even the older boy acknowledged that his mother could not and would not be able to control the boys' actions. (O.C.T., Page 117).

The Orphans' Court terminated the parental rights of the natural mother to the three boys. This decision was affirmed by the Pennsylvania Supreme Court in a wide-ranging review and decision based upon the natural mother's repeated and continued incapacity which could not be remedied, that caused the boys to be without essential parental care or control necessary for their physical and mental well-being. The Pennsylvania Supreme Court recognized the state's constitutional interest in the welfare of the children and rejected Petitioner's argument that the Pennsylvania statute required a showing of a substantial degree of misconduct. (In Re: William L., 383 A. 2d 1228, 477 Pa. 322 (1978)).

A Petition for Writ of Certiorari rather than a Direct Appeal on the constitutional issues, was then filed with the U.S. Supreme Court by Marjorie Lehman (and by a Gladys Beatty, a companion case to the Pennsylvania and U.S. Supreme Court), and the

Petition was denied on October 2, 1978. (Marjorie Lehman v. Lycoming County Children's Services, et al, No. 77-1704, 439 U.S. 880 (1978). This present proceeding for a Writ of Habeas Corpus was filed on January 16, 1979, and was dismissed in Judge Malcolm Muir's Opinion dated September 4, 1979 (Petitioner's Appendix, Pages 135a to 149a). Thereafter, an appeal was lodged, briefs filed, and argument made to the Third Circuit Court of Appeals. On July 13, 1980, a three judge panel of the Third Circuit Court reversed the District Court. Thereafter, the judgment was vacated and rehearing en banc granted on August 15, 1980. After reargument on November 17, 1980, the Third Circuit Court, sitting en banc, affirmed the Order of Dismissal of the Writ of Habeas Corpus by the District Court by their Opinion of March 31, 1980. Petitioner's present Petition for Writ of Certiorari to this court was filed on June 24, 1981.

ARGUMENT

REASONS FOR DENYING THE WRIT

I. THIS DECISION OF THE THIRD CIRCUIT COURT MAY BE RECONCILED WITH THE DECISION OF THE FIFTH CIRCUIT IN DAVIS V. PAGE, WITHOUT GRANTING THE WRIT.

As pointed out by the Petitioners, one week before the Third Circuit ruled in this matter on March 31, 1981, the United States Court of Appeals for the Fifth Circuit, filed a decision opposite to that ultimately reached by the Third Circuit Court in this Lehman matter. See Davis v. Page, 640 F.2d 599 (Fifth Circuit, 1981). However, both the majority decision in Davis and the vigorous dissent refer to the original panel decision in this Lehman matter, dated July 13, 1980. (See Davis, 640 F.2d 602 and 606.) The Davis case raises both the habeas corpus jurisdiction issue and the question of whether counsel for parents in neglect proceedings is constitutionally mandated. As pointed out also by the Petitioner, the substantive

question of right to counsel may be affected by this court's recent decision in Lassiter v. Department of Social Services of Durham County, U.S. , 49 U.S.L.W. 4586 (1981). In light of the present en banc decision by the Third Circuit involved in this Petition, and with the direct holding and focus of Lassiter, the Supreme Court can choose to remand Chastain v. Davis, No. 80-1888, to the Fifth Circuit for reconsideration.

The Middle District Court of Pennsylvania dismissed the original Habeas Corpus Petition in this matter for lack of jurisdiction, relying substantially on the holding of the First Circuit in Sylvander v. New England Home for Little Wanderers, 584 F. 2d 1103 (First Circuit, 1978). Judge Garth writing for the Third Circuit also cited the Sylvander case and stated that "the facts of Sylvander, are remarkably similar to those of this case." (Petitioner's Appendix, Page 13a) Therefore, the First and Third Circuits squarely have ruled that

no habeas corpus jurisdiction exists in termination cases, and the Fifth Circuit's decision was based upon a vacated judgment and an opinion overruled, en banc.

By remanding Chastain v. Davis, and denying the Writ of Certiorari in this matter, the Court can act directly to allow determination whether there is an alleged conflict in the Circuit Courts before its full consideration whether extension of habeas corpus relief is justified in parental termination matters, in addition to its long statutory and constitutional basis in criminal proceedings.

Federal Courts have always preferred to abstain from answering questions involving matters such as those contained in domestic relations suits which the states are by nature best to deal with. See Davis v. Page, 640 F. 2d 599, 605 (1981).

In addition, as found by Judge Muir and then by the Third Circuit Court, sitting en banc, the only directly applicable case of Sylvander v. New England Home for

Little Wanderers, 584 F. 2d 1103 (First Circuit, 1978), concluded that federal habeas corpus relief was unavailable to the parent.

As stated in Sylvander:

> "Federal habeas when applied to persons under state control is a procedure of unique potency within the Federal - state framework, having far different and more far-reaching consequences than a state's utilization of habeas within its own system." 584 F. 2d at 1111.

The Court is referred to the very well reasoned dissent written by Circuit Judge John R. Brown, in the Davis v. Page decision, which is the seminal case now seeking certiorari as Chastain v. Davis, Id.

As expressed by Justice Brown in the Davis v. Page matter:

> "....I feel that this opinion will provide an open invitation for a great, and growing, number of disappointed parents in so called "private" custody suits to seek habeas relief in federal court." 640 F. 2d at 605.

To this Respondent, this also foretells a grave, and unnecessary, new extension of federal habeas

corpus. This Court is urged to deny the Petition for Writ of Certiorari in the matter, and to remand Chastain v. Davis, No. 80-1888, for reconsideration in light of Lassiter and the Third Circuit's en banc decision herein.

II. THE ISSUES INVOLVED IN THIS WRIT HAVE BEEN DETERMINED UNDER FEDERAL LAW AND NEED NOT BE ADDRESSED BY THIS COURT.

A. The Opinions in the Lower Courts provide a firm basis for denying this Writ.

Briefly and simply stated, the issues and positions of Marjorie Lehman have been well and thoroughly argued from the Orphans' Court of Lycoming County, Pennsylvania, during the summer of 1976 through and including the present Petition for Certiorari by the Petitioners herein, in June 1981. Although the direct issue urged in this present Writ is jurisdictional, the background and decisional history of this matter must be significantly evaluated, particularly as it relates to the "custody" and "liberty" requirements of the federal habeas corpus statute. Examination of the Pennsylvania Supreme

Court's decision written by Justice Samuel J. Roberts will satisfy this court that the state courts dealt directly with the constitutional challenges and thorough state review which guards against an arbitrary and capricious disregard of the rights of the natural parent, herein Marjorie Lehman. (See In Re: William L. 383 A. 2nd at 1232, 1233, 1241.) Indeed, District Judge Muir's opinion forms a firm foundation in concise fashion holding that "custody maintained by the Respondent over the three Lehman children is not that type of custody in which the federal habeas corpus remedy may be addressed." (Petitioner's Appendix, Page 147a)

Moreover, Circuit Judge GARTH, in his opinion for the Court en banc, and in his vigorous dissent from the earlier panel decision, focused directly on all issues and holds firmly that federal habeas corpus is not available for a Federal constitutional challenge to Pennsylvania statutory standards for involuntarily terminating a parent's rights to her children

(Petitioner's Appendix, Pages 2a through 24a and 114a to 134a). Habeas Corpus, unlike any other constitutional challenge is not subject to the doctrine of res judicata, because it is society's judgement that avoiding wrongful incarceration and unlawful restriction on liberty outweighs the otherwise compelling interest of finality of litigation. The issue in a termination of parental rights matter is not the liberty interest of the children that is sought to be protected, but the right of the particular parent to raise them. Hence, Judge Garth strongly holds "the custody disputes of the nature addressed here and which essentially involve no more than the question of who shall raise a child to maturity, do not implicate the federal interest in personal liberty sufficiently to warrant the extension of federal habeas corpus." (Petitioner's Appendix, Page 24a)

In addition, Circuit Judge ADAMS, in his concurring opinion joined by three Justices, (Petitioner's Appendix, Pages 24a to 42a) discussess in concise fashion a brief

history of the federal habeas corpus statute and its application. Initially, he holds that "it would appear to be both unwise and impolitic for the federal courts to uncover a whole new font of jurisdiction at this time," by entering the realm of state controlled adoption matters. (Petitioner's Appendix, Page 34a) Judge Adams further holds that even if the federal court had jurisdiction in this case, Plaintiff mother has no standing to assert the action on behalf of her children. It remains undisputed that children have interests separate and apart from their parents and the state itself has an interest in a child's welfare. Particularly herein, where the children have expressed a desire not to live with their mother and have stabilized relationships with foster families their interest and that of the main Petitioner, natural mother, are in conflict. (Petitioner's Appendix, Pages 36a to 39a).

Indeed, the Petitioner - mother's argument can be seen as an attempt to continue an ill-advised presumption

that children are the property of their parents. Justice Roberts, speaking for the majority in the Pennsylvania Supreme Court decision, quoted with favor Chief Justice Berger's statement in Wisconsin v. Yoder, 406 U.S. 205, 92 S. Ct. 1526, 32 L. E. d. 2d 15 (1972):

> "To be sure, the power of the parent even when linked to a free exercise claim, may be subject to limitation.... if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burden." Id. 406 U.S. at 233 - 34, 92 S. Ct. at 1542. (See also, Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 499, 97 S. Ct. 1932, 1936, 52 L. Ed2d 531 (1977). In Re: William L., 383 A. 2nd at 1234.)

The Pennsylvania Supreme Court while acknowledging that parental rights must be accorded significant protection, particularly as interpretated by this Court, also reiterates that these parental rights must yield to a child's essential health and safety needs, and the state may intervene to protect its weaker members, such as infants. (In Re: William L., 383 A. 2d at 1236)

Fundamentally and most directly, a federal habeas

corpus petition must fail because the custody requirement is not met and cannot be met in a case such as this. The Federal habeas corpus statute, as presently interpretated, provide an opportunity to test the restraint of liberty of an individual, and the right to be free, specifically through any unconstitutional practices. A major aspect and question arises as to whether any person is in "custody" herein; the three Lehman boys were voluntarily placed at the County Agency, and have resided in foster homes since June, 1971. We are dealing with a county agency that works most directly with parents and children, in a more direct sense, serving families more than even private organizations as were examined in the Sylvander case.

The boys' liberty has not been hampered, and indeed they have grown into active, healthy and intelligent young men, having the freedom to come and go as they choose in stable and normal family settings. The two youngest boys have been in the same foster home for

over 10 years, which will probably be the adoptive home, and in no sense and no aspect are they in state institutions or under restraint.

Presumably, federal habeas corpus operates to release and to test the confinement, and in this setting, to directly benefit the children. Here there can be no allegation of benefits to the boys, or that their rights, liberties or opportunities are being considered or handled. (Lehman Appendix, Page 14a to 17a) Indeed the direct conversation with the boys and the state trial court over 5 years ago showed no semblance of stress or emotional trauma to the boys. In fact, the boys' interest would be better served through a stable and legally recognized home and family, by ending this proceeding at this point.

B. Other procedures existed under federal rules and statutes for determination of this state parental termination matter.

Marjorie Lehman, through her attorneys had recognized and voluntarily relinquished other definite

and more direct routes to question the federal constitutional issues which she now is attempting to raise through this unjustified extension of federal habeas corpus. As directly cited and discussed by Circuit Judge Garth "(t)he simplest and most direct route was Ms. Lehman's right to appeal to the United States Supreme Court from the adverse judgment of the Supreme Court of Pennsylvania. By this means, Ms. Lehman could have immediately, and as a matter of right, obtained a decision from our highest court." (Petitioner's Appendix, Page 20a, 130a) She did not seek this route in early 1978, but chose to file a Writ of Certiorari to this Court which was denied. The fundamental and basic constitutional issues which have been argued by her since the Orphans' Court hearing in 1976, still form the foundation for her challenge to the Pennsylvania Adoption Act of 1970, which has now been repealed. (See "Pennsylvania Adoption Act", 1980 October 15 P.L. 934, No. 163, Section 101 et seq. (23 Pa. C.S. Section 2101, et seq.).) The same

constitutional issues now being urged by the mother were well framed at that point, and the matter could have been determined on the merits in timlier fashion. (28 U.S.C. Section 1257 (2); see Hicks v. Miranda, 422 U.S. 332, 343-44 (1975)) Strategic or not, the present Petitioner intentionally chose to skirt a direct appeal and decision on the merits. Her efforts to now extend the habeas corpus statute should now be fully rejected.

"The second route to a federal resolution of the federal constitutional challenge is available by the litigant reserving the federal claims during the state court litigation, and then bringing a subsequent challenge to the state statutory scheme in federal court under 42 U.S.C. Section 1983 (1976)." (Petitioner's Appendix, Page 20a, 21a) As pointed out by Judge Garth, sucn an approach is possible, particularly in the Third Circuit, due to the limited res judicata state court judgment in subsequent suits under Section 1983. (See also, New Jersey Educational Association v.

Burke, 579 F.2d 764 (Third Circuit), cert. denied, 439 U.S. (1978). Additionally, Judge Garth observed "that determination of this precise issue has been explicity reserved by the Supreme Court in its recent opinion of Allen v. McCurry, 49 U.S. L.W. 4015, 417 n. 5, n. 10 (1980)." (Petitioner's Appendix, Page 21a fn 11a)

The intricacies of each of these possible routes of federal review of this termination matter, were briefed and fully argued before the Third Circuit Court and provides a framework upon which a federal constitutional challenge is more directly pursued and in a more timely fashion. As recognized by all of the opinions dealing with this federal habeas corpus issue, there comes a point at which the finality of litigation should take place. (See also, Sylvander v. New England Home for Little Wanderers, 584 F.2d at 1112; Petitioner's Appendix, Page 19a, 41a) This is particularly true in that a primary purpose of the Lehman termination

matter in 1976 was to provide the opportunity for the three boys to be given the opportunity to accept and be accepted in stable and full home environments, providing the care, control and subsistence necessary for their physical and mental well-being. This end is not advanced by providing yet another federal forum, through federal habeas corpus, to take another swing at the alleged unconstitutional questions.

CONCLUSION

IN SUMMARY, it is submitted that the great Writ of Federal Habeas Corpus has not been and should not be applied and extended to a federal constitutional challenge by a mother on behalf of her children that had decreed a termination of her parental rights leading to adoption under state law. In addition, federal statutes and case law provide a direct right to appeal or to test federal constitutional issues involved in a custody matter involving termination of parental rights, without invoking the federal habeas corpus writ.

WHEREFORE, Respondent prays that the Petition for Writ of Certiorari to the U.S. Court of Appeals for the Third Circuit in this matter be denied.

Respectfully submitted,

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